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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CHRISTIAN BERTOLI et al., Plaintiffs and Appellants, v. JANET Q. DENNIS et al., Defendants and Respondents.	A150924 (Mendocino County Super. Ct. No. SCUKCVG1056629)

This is the fourth appeal in a long-running battle to control the Irish Beach Clusterhomes, a common interest development comprised of 16 lots and a common area in Mendocino County. The entire property was originally owned and subdivided by respondents William and Tona Moores.[1] After the Moores subdivided it, the development was to be governed by a homeowners association, named the Irish Beach Clusterhomes Association (the Association), and by covenants, conditions and restrictions (Covenants) recited in recorded declarations against each property within the subdivision.

In 2010, a debt collection agency owned by Janet Q. Dennis and Jack Q. Dennis (JQD, LLC, doing business as Pro Solutions) recorded assessment liens on behalf of the Association against 12 homeowners who own six improved lots in the development.[2]

[1] To avoid confusion, we refer to members of the Moores family by first name. William and Tona are referred to collectively as the Moores.

[2] The homeowners are Christian Bertoli, Patricia Bertoli, Michael Farrell, Dean Freedlun, Susan Freedlun, Kent Keebler, Sandra Trujillo, Mark Walker, Deborah Walker, Gayle Arrowood Weaver, Lynne Weaver, and Thomas Weaver. We refer to them

Contesting the validity of the assessments, the Homeowners filed a declaratory relief action against the Moores and Pro Solutions. The trial court granted the Moores' and Pro Solutions' respective motions for summary judgment and entered judgments in their favor. The Homeowners appeal from the judgments and two postjudgment orders awarding fees and costs to the Moores. We affirm.

LEGAL BACKGROUND

The Davis-Stirling Common Interest Development Act (the Davis-Stirling Act) (Civ. Code, § 4000 et seq.) governs the creation and operation of common interest developments. The Davis-Stirling Act "consolidated the statutory law governing condominiums and other common interest developments. . . . Common interest developments are required to be managed by a homeowners association [citation], defined as 'a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development' [citation], which homeowners are generally mandated to join [citation]." (*Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 81.)

"Among the requirements for the creation by a developer of a common interest development is the recording of a declaration. [Citation.] The declaration includes several parts, including the 'restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes [i.e., the covenants, conditions and restrictions].' [Citation.] The declaration also must provide for and name an association that will manage the development. [Citations.] These covenants and restrictions, unless unreasonable, 'inure to the benefit of and bind all owners of the separate interests in the development.' ([Former] Civ. Code, § 1354, subd. (a).)[3] [¶] . . . [¶] The developer and any subsequent seller of an interest in a

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collectively as the Homeowners. Janet Dennis, Jack Dennis (doing business as Pro Solutions), and their employee Jessica Koller are referred to collectively as Pro Solutions.

[3] In 2012, the Legislature repealed Civil Code section 1354 and reenacted it, without substantive change, as Civil Code section 5975. (*Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1138, fn. 1.)

common interest development must provide a prospective purchaser with, among other documents, the governing documents of the development including the [covenants, conditions and restrictions]." (*Treo @ Kettner Homeowners Assn. v. Superior Court* (2008) 166 Cal.App.4th 1055, 1061–1062.) "[U]nder the Davis-Stirling Act, each owner [in a common interest development] either has expressly consented or is deemed by law to have agreed to the terms in a recorded declaration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 241.)

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts in this case are taken from the evidence submitted in support of and in opposition to summary judgment. We also judicially notice our opinions in prior related appeals (*Irish Beach Clusterhomes Assn. Bd. of Governors v. Farrell* (Jan. 21, 2009, A120147, A121049) [nonpub. opn.] (*Irish Beach Board of Governors*); *Bertoli v. Dennis* (Jan. 5, 2015, A137221, 137786) [nonpub. opn.] (*Bertoli*); *JQD Inc. v. Irish Beach Clusterhomes Assn.* (Mar. 6, 2015, A138145) [nonpub. opn.]). (See Evid. Code, § 452, subd. (d).) We refer the reader to these prior opinions for a more detailed history of the litigation between the parties.

The Covenants that govern this development were originally recorded in 1980 and amended in 1989. In 2003, two factions formed: one comprised of the Moores and their daughter, Jessica Olson, who collectively own 10 unimproved lots, the other comprised of the Homeowners, who own six improved lots. In 2004, the Moores and Olson elected the Association Board of Governors (Board of Governors) and William as its president. Certain assessments were also levied.

The Prior Litigation

In March 2005, the Board of Governors and William, acting as its president, sued Farrell and Trujillo to collect the 2004 assessments, as well as to obtain a judicial declaration of the parties' rights to manage and operate the Association. Farrell, who disputed William's authority to act on behalf of the Association, filed a cross-complaint against the Board of Governors and William in his individual capacity. The case was tried by the Honorable Lloyd Von Der Mehden, who concluded that, under the

Covenants, only owners of lots that had been improved with a home were entitled to vote. The court ruled the actions taken at the 2004 meetings were invalid. The court also ruled that William individually breached his fiduciary duties to the Association but awarded only nominal damages of $1.

The Board of Governors and William, acting as its president, filed the appeal resulting in our *Irish Beach Board of Governors* decision. They argued the trial court misinterpreted the Association's governing documents when it ruled that only owners of lots improved with a home were entitled to vote. We did not reach the issue, however, because it was conceded on appeal that the Board of Governors was not a legal entity capable of bringing or defending suit. Accordingly, we held that the judgment was void "to the extent it [was] in favor of or against the '[Association] Board of Governors' and 'William Moores, President.' " (*Irish Beach Board of Governors, supra,* A120147, A121049.)

Subsequently, the Association imposed additional assessments against the improved lots. When the assessments went unpaid by the Homeowners, William, acting as chairman of the Association, hired Pro Solutions in 2010 to collect the assessments. Pro Solutions, acting as the collection agent for the Association, sent notices to each of the Homeowners of the Association's intent to record liens. Despite protest from the Homeowners that the assessments were "unauthorized and invalid," Pro Solutions recorded liens against the Homeowners' properties.

The Current Litigation

Contesting the validity of the assessments, the Homeowners sued Pro Solutions and the Moores for, among other things, declaratory relief.[4] In *Bertoli, supra,* A137221, 137786, we reversed, in part, an order granting the defendants' motion for judgment on the pleadings, concluding causes of action for declaratory relief had been adequately

[4] Although Pro Solutions successfully moved for an order joining the Association and Olson as indispensable parties to the Homeowners' complaint, a final judgment has since been entered in their favor. Neither Olson nor the Association are parties to the instant appeal.

pleaded. In particular, the Homeowners alleged: "[T]he assessments which Defendants seek to collect are invalid because . . . [the Moores] and [Olson], as individual owners of unimproved lots without structures, have no right to vote under the [Covenants], whereas Defendants . . . dispute this contention and contend that the assessments are valid and enforceable and will attempt to foreclose on [Homeowners'] real properties if the assessments are not paid." The Homeowners sought "a declaration of the rights and duties of the parties, including a declaration that the assessments . . . are invalid and that owners of unimproved lots have no rights to vote by earlier decision."

Pro Solutions tendered its defense to the Association, but the Association failed to defend or indemnify Pro Solutions. Pro Solutions filed a cross-complaint against William and the Association for indemnity and ultimately released the liens.

Summary Judgment Motions

Pro Solutions filed a motion for summary judgment on the basis it was no longer a real party in interest and, as to it, there was no actual controversy. (See Code Civ. Proc., § 1060.) Although the Homeowners attempted to dispute Pro Solutions' assertion it was no longer an agent for the Association or the Moores, the trial court concluded the fact was undisputed because the Homeowners offered no evidence to support their position. Concluding no actual controversy existed between Pro Solutions and the Homeowners, the trial court granted Pro Solutions' motion and entered judgment in Pro Solutions' favor.

The Homeowners and the Moores filed competing motions for summary judgment. Both motions sought judicial construction of key language in the Covenants concerning Association voting rights. Most relevant is language found in section 12(e) of the Covenants, which provides in part: "There shall be one (1) vote for *each Parcel*." (Italics added.) "Parcel" is defined by the Covenants to mean "the Lot and Buildings thereon and appurtenances thereto." "Building" is defined to mean "all of the improvements located upon a lot or lots." The Homeowners interpreted these provisions to mean only the owners of improved lots have Association voting rights. The Moores,

on the other hand, argued the owners of *all* lots (improved or unimproved) have voting rights.

The trial court concluded no extrinsic evidence was necessary to resolve the voting rights issue and the Moores' interpretation was the only reasonable understanding of the Covenants. Accordingly, the trial court granted the Moores' motion, denied the Homeowners' motion, and entered judgment in the Moores' favor.

Fees and Costs

After judgment, the Moores sought their costs and moved for attorney fees, under Civil Code sections 1717 and 5975. The Homeowners moved to strike or tax the Moores' costs and for a determination they were the prevailing party. They also opposed the Moores' motion for fees. The trial court awarded attorney fees to the Moores, in the amount of $125,796.50, denied the Homeowners' motion to strike or tax costs, and found the Moores were the prevailing party.

The Homeowners filed timely notices of appeal from the judgments in favor of the Moores and Pro Solutions as well as the postjudgment fee and costs orders in favor of the Moores.

DISCUSSION

I.

Moores' Summary Judgment Motion

We reject the Homeowners' claim the trial court erred when it granted summary judgment to the Moores. We agree with the trial court the Covenants grant voting rights to owners of both improved and unimproved parcels.

A.

On review of an order granting summary judgment, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142.) Interpretation of the Covenants, like interpretation of any contract where the credibility of extrinsic evidence is not at issue, is a question of law to be reviewed de novo. (*Bear Creek Planning Committee v. Ferwerda* (2011) 193 Cal.App.4th 1178, 1183.)

We interpret the Covenants under the same rules applied to interpreting other contracts. (*Bear Creek Planning Committee v. Ferwerda, supra,* 193 Cal.App.4th at p. 1183.) "[T]he primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenanting parties." (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 444–445; accord, Civ. Code, § 1636.) " 'We interpret words in a contract in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. [Citation.] If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs.' " (*Starlight Ridge South Homeowners Assn. v. Hunter-Bloor* (2009) 177 Cal.App.4th 440, 447; accord, Civ. Code, §§ 1638–1639, 1644.) All covenants in a recorded declaration are enforceable as written unless unreasonable. (Civ. Code, § 5975, subd. (a); *Pinnacle Museum Tower Assn. v. Pinnacle Market Development, LLC, supra,* 55 Cal.4th at p. 239.)

B.

The Homeowners contend the trial court misinterpreted the Covenants. The central premise of their argument is that the Covenants create two classes of owners: owners of developed parcels are members of the Association with full voting rights, whereas owners of undeveloped parcels (including the Moores) are excluded from the Association and hold no voting rights. The Homeowners contend the Covenants are designed this way to encourage owners to develop their parcels.

But the Covenants do not discuss two classes of owners with different membership and voting rights. On the contrary, section 12 of the Covenants simply says that an owner of a parcel is a member in the Association: "(d) There shall be one (1) membership in the Association appurtenant to each Parcel.· The rights incidental to each membership shall be exercised by the Owner of the Parcel to which said membership is appurtenant. Ownership shall be the sole qualification for membership. No membership may be separated from the residence lot to which it is appurtenant. . . ." Likewise, an owner has the right to vote at Association meetings: "(e) There shall be one (1) vote for each Parcel. Any Owner may attend and vote at meetings in person or by proxy

holder. . . ." Indeed, section 7 of the Covenants states that an owner can *lose* her voting rights if she fails to pay her assessments, without regard for whether the owner's parcel is developed or undeveloped.

The Homeowners fail to explain persuasively how these provisions exclude owners of undeveloped parcels from being voting members of the Association. Instead, they rely heavily on the Covenants' definition of the term parcel: " 'Parcel' shall mean the Lot and Buildings thereon and appurtenances thereto." The Homeowners argue that, because the membership and voting rights provisions in section 12 of the Covenants apply to the owner of a "parcel," owners do not have these rights unless they own a "lot" *and* "buildings" *and* "appurtenances."

We are not convinced. In the section on voting rights, the Covenants explain that "rights of ownership" may be proven simply by providing a grant deed or title insurance policy, "which shall be deemed conclusive in the absence of a conflicting claim based on a later deed or policy." Nothing requires an owner to prove her parcel also has buildings and appurtenances. We agree with Judge Nadel "the term 'parcel' may include the lot, the buildings thereon and 'appurtenances thereto,' but it *does not require* a lot with buildings thereon and appurtenances thereto."

The Homeowners also rely on a recital in which the original grantor explained its intentions for the development: "Grantor plans to subdivide and develop the [property] and impose thereon beneficial restrictions under a general plan of improvement for the benefit of all of such real property, every part thereof, and interest therein. Initially, Grantor intends to subdivide and develop the [property] in accordance with said plan . . . to the end that the entire property may ultimately be developed, owned, used, managed, occupied and improved as a single project for the benefit of every part thereof and interest therein and the owners of such parts and interests." The Homeowners also point out "the very name of the association includes the term 'Cluster*homes*." They claim the recital and development name demonstrate the parties' intent to facilitate development. The Homeowners use this to bolster their contention that the parties intended, by using the term "parcel," to create two different classes of owners.

We disagree. The recital is an unremarkable vision for a subdivision, with a generic goal that the subdivision's plan and restrictions ultimately will benefit all the owners. Certainly, the parties intended to facilitate development—that is presumably the case with any subdivision. Nothing in the recital or the name "Clusterhomes" suggests the parties intended to create two classes of owners with different rights or otherwise to compel owners to develop their parcels.

Finally, the Homeowners fault the trial court's statement that, under the Davis-Sterling Act, "each owner of an interest in the common interest development must become a member of the association," citing the California Code of Regulations and a leading treatise. (See Cal. Code Regs., tit. 10, § 2792.8, subd. (a)(1) [governing documents of common interest subdivisions "shall ordinarily provide for . . . [c]reation of an organization (hereafter Association) of subdivision interest owners"]; 8 Miller & Starr, California Real Estate, § 28:12, p. 28-45 ["[e]ach owner of an interest in the common interest subdivision must become a member of the association . . ."].) Conceding "membership in an association is ordinarily mandatory," the Homeowners contend an exception applies when an owner receives an interest in a common area, which the Homeowners claim is the case here. (See Civ. Code, § 4200 [Davis-Sterling Act "applies and a common interest development is created whenever a separate interest in the common area or membership in the association is, or has been, conveyed . . ."].) We need not resolve the issue because we agree with the trial court that, under the plain language of the Covenants, all owners are members of the Association. The fact membership is ordinarily mandatory further undercuts the Homeowners' arguments that this case is an exception to the rule.

C.

We reject the Homeowners' arguments that the Covenants are unreasonable, illegal, and unconscionable. A recorded land use restriction in a common interest development is presumptively reasonable (see Civ. Code, § 5975) and will not be set aside unless it is found to be arbitrary, violates fundamental public policy, or imposes a burden that far outweighs any benefit. (*Nahrstedt v. Lakeside Village Condominium*

Assn. (1994) 8 Cal.4th 361, 380–382.) The Homeowners may be legitimately frustrated at the slow pace of development and by decisions of the Association, but we decline their invitation to rewrite the membership and voting rules that the parties agreed to follow. (See *Cebular v. Cooper Arms Homeowners Assn.* (2006) 142 Cal.App.4th 106, 120–124 [upholding voting system deliberately structured to grant more votes to owners that paid larger assessments].)

II.

Pro Solutions' Summary Judgment Motion

We also agree with the trial court's decision granting summary judgment to Pro Solutions due to the lack of an actual controversy. (Code of Civ. Proc., § 1060.)

First, the Homeowners assert their request for declaratory relief "was not limited to the issue of voting rights" but more generally contended the liens were invalid "because the Association no longer exists." But that has nothing to do with Pro Solutions, which released the liens and is no longer an agent of the Association.

Second, the Homeowners suggest they can obtain a declaration of Pro Solutions' past wrongdoing that will prevent some speculative future action. It is settled, however, that " '[d]eclaratory procedure operates prospectively, and not merely for the redress of past wrongs.' " (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.) The Homeowners cite no authority supporting their position they can seek prospective relief against a party that currently has no interest in the validity of the assessments at issue. " 'The "actual controversy" language in Code of Civil Procedure section 1060 encompasses a *probable* future controversy relating to the legal rights and duties of the parties. [Citation.]' [Citation.] It does not embrace controversies that are 'conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.' " (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.)

III.

Attorney Fee Award to the Moores

The Homeowners contend the trial court erred in requiring them to pay the Moores' attorney fees. They maintain attorney fees are not statutorily or contractually

authorized in this action. Even if authorized, the Homeowners contend the trial court's award of fees improperly contravened the final order of a different judge in the same action. We disagree.

The Davis-Stirling Act provides a statutory basis for fee shifting: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." (Civ. Code, § 5975, subd. (c).) This provision " ' "reflect[s] a legislative intent that [the prevailing party] receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied." ' " (*Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 773.) " 'Governing documents' means the declaration and any other documents, such as bylaws, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association." (Civ. Code, § 4150.)

To determine whether a particular action is an action to enforce the governing documents, courts look at "the essence of the claim." (*Salawy v. Ocean Towers Housing Corp*. (2004) 121 Cal.App.4th 664, 671; accord, *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 259–260 [although framed as an action to enforce a settlement agreement, reviewing court focused on "gravamen" of the complaint, "nature of the dispute between the parties," and "nature of the relief sought"].) We review this determination de novo. (*Salawy*, at p. 669.)

The Homeowners' declaratory relief cause of action did, in fact, seek to enforce their interpretation of the Covenants voting rights provision. The essence of the claim was that the Covenants entitled only the owners of developed lots to vote and the Moores had violated these provisions. The Homeowners asked the trial court for "a declaration that the assessments . . . are invalid and that owners of unimproved lots have no rights to vote . . . ." It is immaterial that the Homeowners sought relief in equity rather than at law. (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1380.) The trial court did not err in concluding the Homeowners' declaratory relief cause of action sought to enforce the Covenants. (See *Kaplan v. Fairway Oaks Homeowners*

Assn. (2002) 98 Cal.App.4th 715, 717, 719–721 [prevailing homeowners association entitled to attorney fees because gist of action challenging validity of election was to enforce bylaws' proxy and cumulative voting rights].)

In the alternative, the Homeowners suggest another trial judge's 2012 order denying attorney fees was binding against Judge Nadel and we effectively affirmed the 2012 order when we dismissed the Moores' previous appeal of the order. The Homeowners are correct that "one trial court judge may not reconsider and overrule a ruling of another judge." (*Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876.) But that is not what happened here.

In 2012, before our decision in *Bertoli*, the Honorable Richard J. Henderson granted the defendants' motion for judgment on the pleadings and granted judgment in their favor. The Moores moved for an award of attorney fees under former Civil Code section 1354, subdivision (c). Judge Henderson determined "the [Homeowners'] action was primarily brought to construe and enforce an appellate court decision" not to "enforce the governing documents" and denied the motion. The Moores appealed from the order denying their motion for attorney fees (appeal No. A137786). In *Bertoli*, we *agreed with the Homeowners* that their first amended complaint stated causes of action for declaratory relief regarding voting rights. Accordingly, we *reversed* the judgment as to the fourth and seventh causes of action for declaratory relief. (*Bertoli, supra,* A137221, A137786.) We then dismissed, as moot, the Moores' appeal of the postjudgment attorney fee order because we reversed, in part, the judgment. (See *ibid*.) Simply put, Judge Henderson's postjudgment fees order is not binding because it automatically fell when the judgment on which it was based was reversed. (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.) "After reversal of a judgment 'the matter of trial costs [is] set at large.' " (*Ibid*.)

Because the Moores are entitled to their attorney fees under the fee shifting statute (Civ. Code, § 5975, subd. (c)), we need not consider a contractual basis for the award (*id.*, § 1717).

IV.

Costs Award to Pro Solutions

Finally, we reject the Homeowners' contention the trial court erred when it found Pro Solutions was the prevailing party for costs purposes.

The trial court correctly applied Code of Civil Procedure section 1032, subdivision (a)(4), which defines the term " '[p]revailing party' " to include "a defendant as against those plaintiffs who do not recover any relief against that defendant." This definition covers Pro Solutions. Only "in situations other than as specified" should the prevailing party be determined by the court. (*Ibid*.)

Additionally, as the Homeowners concede elsewhere in their opening brief, the postjudgment order denying their motion to tax Pro Solutions' costs was separately appealable but not appealed. (Code Civ. Proc., § 904.1, subd. (a)(2) ["[a]n appeal . . . may be taken . . . [f]rom an order made after a judgment"].) To the extent the Homeowners seek to challenge that order or a postjudgment fees award to Pro Solutions, we have no jurisdiction to review either order. (See *Allen v. Smith, supra,* 94 Cal.App.4th at p. 1284 ["appellate court has no jurisdiction to review an award of attorney fees made after entry of the judgment, unless the order is separately appealed"].)

DISPOSITION

The judgments in favor of the Moores and Pro Solutions, and the postjudgment orders awarding fees and costs to the Moores, are affirmed. The Moores and Pro Solutions are entitled to their costs on appeal.

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.